FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 19 1945
CHARLES ELMORE CROPLEY
CLERK

No. 122

In the Supreme Court of the United States

OCTOBER TERM, 1945

JULIUS FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	14
Argument:	
There was no error in the failure of the trial court to instruct the jury that petitioner's mental and emotional characteristics, not amounting to legal insanity, should be considered by them on the issues of deliberation and premeditation	16
A. This Court should not at this time permit mental weakness, not amounting to legal insanity, to reduce a first-degree murder to a lesser degree of homicide	22
B. Even if the suggested rule should be regarded favorably, the evidence did not reach that degree of specificity which would have permitted the jury to determine whether petitioner lacked the capacity to deliberate or to premeditate the homicide	36
Conclusion	38

CITATIONS

Cases:	
Anderson v. *State*, 43 Conn. 514	33
Armstrong v. *United States*, 41 F. 2d 162	17
Azman v. *State*, 123 Ind. 347	33
Banks v. *States*, 133 Tex. Cr. Rep. 541	23
Bell v. *State*, 120 Ark. 530	33
Bergera v. *United States*, 297 Fed. 102	17
Bishop v. *United States*, 107 F. 2d 297	20
Blanton v. *United States*, 213 Fed. 320	18
Bowden v. *State*, 151 Ga. 336	23
Chriswell v. *State*, 171 Ark. 255	23
Cline v. *Commonwealth*, 248 Ky. 609	23
Cody v. *Commonwealth*, 180 Va. 449	21
Commonwealth v. *Barner*, 199 Pa. 335	33
Commonwealth v. *Clark*, 292 Mass. 409	33
Commonwealth v. *Cooper*, 219 Mass. 1	33
Commonwealth v. *Cressinger*, 193 Pa. 326	23
Commonwealth v. *Devereaux*, 257 Mass. 391	23
Commonwealth v. *Hollinger*, 190 Pa. 155	33, 35
Commonwealth v. *Kline*, 341 Pa. 238	21
Commonwealth v. *Lehman*, 309 Pa. 486	21

Cases—Continued

	Page
Commonwealth v. *McCausland*, 348 Pa. 275	23
Commonwealth v. *Scott*, 14 Penna. District & County Rep. 191	33, 35
Commonwealth v. *Soaris*, 275 Mass. 291	20, 21
Commonwealth v. *Stewart*, 255 Mass. 9	23
Commonwealth v. *Szachewicz*, 303 Pa. 410	23
Commonwealth v. *Taylor*, 263 Mass. 356	21
Commonwealth v. *Trippi*, 268 Mass. 227	33
Commonwealth v. *Wireback*, 190 Pa. 138	31, 33
Daniels v. *State*, 186 Ark. 255	23
Davis v. *United States*, 165 U. S. 373	22
Dejarnette v. *Commonwealth*, 75 Va. 867	34
Del Vecchio v. *Bowers*, 296 U. S. 280	36
District of Columbia v. *Pace*, 320 U. S. 698	36
Donahue v. *State*, 165 Ind. 148	33
Fisher v. *People*, 23 Ill. 283	33
Foster v. *State*, 37 Ariz. 281	33
Foster v. *State*, 222 Ind. 133	23
Freihage v. *United States*, 56 F. 2d 127	17
Funk v. *United States*, 290 U. S. 371	32
George v. *United States*, 125 F. 2d 559	17
Gills v. *Commonwealth*, 141 Va. 445	21
H. M. Advocate v. *Edmonstone*, 47 S. L. R. 7	34
H. M. Advocate v. *Ferguson*, 19 S. L. R. 341	34
H. M. Advocate v. *Granger*, 17 S. L. R. 253	34
H. M. Advocate v. *Muir* (1933), S. L. T. R. 403	34
H. M. Advocate v. *Savage*, 61 S. L. R. 12	34
Hempton v. *State*, 111 Wis. 127	34, 35
Hogue v. *State*, 65 Tex. Cr. 539	33
Holloway v. *United States*, 148 F. 2d 665	22, 23, 24
Hopt v. *People*, 104 U. S. 631	19, 20, 35
Hotema v. *United States*, 186 U. S. 413	22
Jacobs v. *Commonwealth*, 121 Pa. 586	33
Jones v. *Commonwealth*, 75 Pa. 403	34
Kreiner v. *United States*, 11 F. 2d 722, certiorari denied, 271 U. S. 688	17
Lasecki v. *State*, 160 Wis. 274	21
McGuire v. *United States*, 111 F. 2d 199, certiorari denied, 310 U. S. 643	20
McGutcheon v. *State*, 199 Ind. 247	23
McDonald v. *United States*, 241 Fed. 793	18
McKenny v. *State*, 105 Tex. Cr. Rep. 353	23
Mangrum v. *Commonwealth*, 19 Ky. Law Rep. 94	33
Matheson v. *United States*, 227 U. S. 540	22
Maulding v. *Commonwealth*, 172 Ky. 370	33
Nestlerode v. *United States*, 122 F. 2d 56	21
New York Life Ins. Co. v. *King*, 93 F. 2d 347	22
Oborn v. *State*, 143 Wis. 249	34
Parker v. *State*, 91 Tex. Cr. 68	23

Cases—Continued

	Page
Patterson v. *People*, 46 Barbour (N. Y.) 625	23
People v. *Burgess*, 153 N. Y. 561	23
People v. *Cordova*, 14 Cal. (2d) 308	33
People v. *Dugger*, 5 Cal. (2d) 337	23
People v. *Farmer*, 194 N. Y. 251	23
People v. *French*, 12 Cal. (2d) 720	33
People v. *Irwin*, 166 Misc. (N. Y.) 751	23
People v. *Kimball*, 5 Cal. (2d) 608	23
People v. *Koerber*, 244 N. Y. 147	21
People v. *Leonardi*, 143 N. Y. 360	21
People v. *Marquis*, 344 Ill. 261	23
People v. *Moran*, 249 N. Y. 179	34
People v. *Norton*, 138 Cal. App. 70	23
People v. *Perry*, 195 Cal. 623	23
People v. *Troche*, 206 Cal. 35	33
Percifal v. *Commonwealth*, 212 Ky. 673	33
Ritter v. *Mutual Life Insurance Co.*, 169 U. S. 139	22
Rogers v. *Commonwealth*, 96 Ky. 24	33
Rozier v. *State*, 185 Ga. 317	23
Sage v. *State*, 91 Ind. 141	33
Sindram v. *People*, 88 N. Y. 196	31, 33
Smith v. *United States*, 36 F. 2d 548	22
Spencer v. *State*, 69 Md. 28	33, 35
State v. *Anselmo*, 46 Utah 137	34
State v. *Close*, 106 N. J. L. 321	33
State v. *Fenik*, 45 R. I. 309	34
State v. *Flowers*, 58 Kan. 702	23, 24
State v. *Green*, 78 Utah 580	34
State v. *Holloway*, 156 Mo. 222	33
State v. *Jackson*, 346 Mo. 474	23
State v. *James*, 96 N. J. L. 132	33, 35
State v. *Johnson*, 40 Conn. 136	33
State v. *Johnson*, 233 Wis. 668	23
State v. *Kupis*, 37 Del. 27	20
State v. *Macias*, 60 Ariz. 93	23
State v. *Maioni*, 78 N. J. L. 339	33
State v. *Martin*, 102 N. J. L. 388	28, 33
State v. *Nocl*, 102 N. J. L. 659	33, 35
State v. *Paulsgrove*, 203 Mo. 193	33
State v. *Pinski*, 163 S. W. 2d 785	23
State v. *Rodia*, 132 N. J. L. 199	33
State v. *Saxon*, 87 Conn. 5	33
State v. *Schafer*, 156 Wash. 240	23
State v. *Schilling*, 95 N. J. L. 145	34
State v. *Schlaps*, 78 Mont. 560	23
State v. *Schneider*, 158 Wash. 504	33
State v. *Tapic*, 173 La. 779	23
State v. *Van Vleck*, 57 Idaho 316	33

Cases—Continued Page

State v. *Wilson*, 11 N. W. 2d 737 20
Tate v. *Commonwealth*, 258 Ky. 685 20
Taylor v. *Commonwealth*, 109 Pa. 262 23
Tillery v. *United States*, 285 Fed. 119 18
Timell v. *United States*, 5 F. 2d 901 17
Travers v. *United States*, 6 App. D. C. 450 23
Tucker v. *United States*, 151 U. S. 164 20
United States v. *Fore*, 38 F. Supp. 140 22
United States v. *Lee*, 15 D. C. (4 Mackey) 489 ..... 19, 33
Wartena v. *State*, 105 Ind. 445 23
Watlington v. *United States*, 233 Fed. 247, certiorari denied, 242 U. S. 645 18
Weiler v. *United States*, 323 U. S. 606 32
Winston v. *United States*, 172 U. S. 303 20
Witty v. *State*, 75 Tex. Cr. Rep. 440 33
Woodruff v. *State*, 164 Tenn. 530 23

Statutes:

D. C. Code (1940):
Sec. 22-2401 2
Sec. 22-2403 2
Sec. 22-2404 2

Miscellaneous:

Abrahamsen, *Crime and the Human Mind* (1944):
P. 26 30
P. 193 26
Glueck, *Mental Disorder and the Criminal Law* (1925), pp. 190-208, 310 ..... 26, 35
Grasset, *The Semi-Insane and the Semi-Responsible* (Eng. Transl. by Jellife, 1907), p. 349 26
Hall, *Mental Disease and Criminal Responsibility*, 45 Col. Law Rev. 677, 683 (1945) 30
Halsbury's *Laws of England* (2d ed.) vol. 9, p. 22 34
Healy, *The Individual Delinquent* (1917), p. 30 26
Hoag, *Crime, Abnormal Minds and the Law* (1923), p. 77 26
Keedy, *Insanity and Criminal Responsibility*, 30 Harv. Law Rev. 535, 552-554 (1917) 26
Mental Abnormality and Crime, English Studies in Criminal Science (1944), pp. 61-63 26
Miller, *Criminal Law* (1934), p. 134 35
Note, 79 U. of Pa. Law Rev. 209 (1930) 26
Weihofen, *Insanity as a Defense in Criminal Law* (1933) 21, 26, 29, 35
Weihofen, *Partial Insanity and Criminal Intent*, 24 Ill. Law Rev. 505 ..... 26, 29, 30, 32
Wharton, *Criminal Law* (12th ed.), vol. 1, sec. 64 26
White, *Insanity and the Criminal Law* (1923), p. 89 26
Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. of Pa. Law Rev. 426, 450 (1939) 26

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 122

JULIUS FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 115–118) is reported at 149 F. 2d 28.

JURISDICTION

The judgment of the Court of Appeals was entered April 23, 1945 (R. 118–119), and a petition for rehearing (R. 119–120) was denied May 7, 1945 (R. 120). The petition for a writ of certiorari was filed June 9, 1945, and was granted October 8, 1945 (R. 122). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in petitioner's trial for murder in the first degree, the trial court was required to instruct the jury that on the issues of deliberation and premeditation they should consider evidence concerning petitioner's mental and emotional characteristics, such evidence, however, not establishing that he was legally insane.

STATUTES INVOLVED

The District of Columbia Code (1940) provides in part:

> Section 22–2401: Whoever, being of sound memory and discretion, kills another purposely * * * of deliberate and premeditated malice * * * is guilty of murder in the first degree.
>
> Section 22–2403: Whoever with malice aforethought, except as provided in section(s) 22–2401, * * * kills another, is guilty of murder in the second degree.
>
> Section 22–2404: The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years.

STATEMENT

An indictment in six counts was returned against petitioner in the United States District Court for the District of Columbia charging that he murdered Catherine Cooper Reardon on March 1, 1944. Count 1 alleged that he purposely killed the victim with deliberate and premeditated malice by choking and strangling her, and count 2 alleged that he killed her by beating her with a stick (R. 1–6).[1] After a jury trial, petitioner was found guilty on count 1 and, by direction of the court, he was found not guilty on count 2 (R. 7–8, 112–113). Petitioner received the mandatory death sentence (R. 9–10), and on appeal to the Court of Appeals for the District of Columbia, the judgment was affirmed (R. 115–119).

The evidence adduced at petitioner's trial may be summarized as follows:[2]

The deceased was employed in a library at the Washington Cathedral (R. 12, 14, 44). On the morning of March 2, 1944, she was found dead; her body was discovered in a steam pipe tunnel in a subbasement of the Cathedral (R. 14, 25). An autopsy disclosed that death was caused by

[1] At the close of its case, the Government abandoned the other counts (R. 56), which charged the murder by pushing the victim against a sharp object, and that it was committed in the perpetration of a robbery.

[2] Petitioner did not dispute that he killed Miss Reardon, but claimed, as he does now, that he was not guilty of a premeditated deliberate murder (see R. 11–12; Pet. 3, 9).

fractures of the skull or asphyxia due to strangulation (R. 26–27). Petitioner, who was employed as a janitor at the Cathedral, was arrested later during the day of March 2 (R. 19, 57).[3] After his arrest, he made a statement to the police concerning the killing, which was received in evidence (Gov. Ex. 33, R. 47, R. 49–55). In this statement, petitioner said that he went to the library at 9:00 A. M. on March 1, 1944, and there saw the deceased. He told her that he understood that she had complained about dirt or dust under her desk, and she said that she could not "see why you can't clean it every day 'cause you are getting paid for that." Then she called him, "You black nigger," whereupon petitioner said, "Wait a minute; I don't like that," and he "smacked her." The deceased ran down "in the back and she started hollering. I had actually gotten mad at that time and ran upstairs and got a stick of wood from the fireplace and came back down. She started hollering again and I struck her over the head with the stick of wood. Then I also said 'If I don't kill you, it will be the last of me'" (R. 51). When the deceased continued screaming, petitioner choked her, and she fainted. Then he carried her to the basement where he "finished" her by cutting her throat.[4]

[3] Petitioner was arraigned the following morning on a murder charge (R. 47).

[4] The autopsy showed a small superficial stab wound on the deceased's neck (R. 26–27).

He removed the deceased's undergarments which he used to clean the blood from the library floor, took a ring from her finger, and went home. The principal reason he assaulted her was that she had reported him for failing to clean the floor (R. 51–55.)

At the time of the trial petitioner, according to his testimony, was 32 years of age and was married. He was born in Virginia and was reared by his grandmother, his mother having died when he was quite young. He quit school in the third grade. After he left school, he "did different kinds of work, like working on a farm." He finally came to Washington, where he worked at one job as a chauffeur and butler for five years, quitting "because I couldn't get a raise." Thereafter he "worked at different jobs, chauffeuring and butlering." He then became an elevator operator, and later got a job with a chemical company as a household fumigator, which, apparently, he held for three years. He received a raise in salary at this job but quit because he was required to work on Sundays, the "only day I had to be with my wife." On December 20, 1943, he went to work at the Cathedral at, evidently, a higher salary (R. 56–57, 73, 85). Except for several convictions for drunkenness, it was stipulated that peti[illegible] had no prior criminal record (R. 64, 73). He [illegible]joyed, according to one of his neighbors, a "very, very

good" reputation in the community in which he lived for "peace and good order" (R. 91).

Petitioner testified that he had no intention of killing the deceased; that he became angry because of the epithet addressed to him by the deceased; "I got angry at what she said. Then I smacked her. I felt like I got angry inside. * * * No white person had ever called me a 'nigger' before. I had been called that by my own colored people. * * * She ran out from behind her desk, down toward the back, screaming. I started upstairs, to run up. The screaming seemed to have gotten on my nerves. * * * When I got up to the top of the steps, the noise got so loud, it kept scaring me. I ran into the library, got the stick of wood, ran back downstairs and started * * * striking her with it.[5] The stick broke. She was still screaming, and I began choking her then. She seemed to have become unconscious and I [took] her by the hand and started to drag [her] out. * * * When I struck her with the stick I was not trying to kill her, I was just trying to keep her from making a noise. When I began choking her, I was not trying to kill her; she started hollering and I tried to stop her from hollering. * * * She stopped finally and I did not strike her * * * after the noise had ceased. * * * While I was * * * cleaning up the spots on

[5] Petitioner testified that it took him about a minute to get the stick (R. 76).

the floor, she started hollering again. She kept hollering, seemed like to me. She kept trying to holler. I took out my knife and stuck her in the throat. My idea was just trying to stop her from hollering * * *. The noise kept on getting on my nerves. * * * Before Miss Reardon called me 'nigger,' I had no feeling at all against her" (R. 59–60, 64; see also R. 75–77, 81–83).

Prior to the introduction of any psychiatric testimony for the defense, the question arose, during a colloquy between court and counsel, as to the permissible limits of such testimony. It apparently was the position of petitioner's counsel, at least initially, that while he was not prepared to show that petitioner was mentally incapable, in the legal sense, of committing the crime, since he knew the difference between right and wrong and was able to choose the right, petitioner was entitled to have the jury consider that his capacity to deliberate was impaired by reason of mental abnormality (R. 64–69). When the trial judge pointed out that, in his view, that was not sufficient (R. 66), petitioner's counsel asserted that petitioner's evidence would show that "his deliberation was impaired"; that he "couldn't actually" deliberate; that "he hasn't the capacity" (R. 69); that he "was incapable of resisting" because of "an irresistible impulse" (R. 70). While petitioner's counsel continued to insist that he was not claiming that petitioner

was legally irresponsible, the judge felt that he was actually, in essence, so claiming, and hence that it would be safer to allow him to proceed with the development of his expert testimony, since, otherwise, there might be an improper rejection of the defense of insanity (R. 70–72).

The expert testimony as to petitioner's mental condition was:

Testifying for petitioner, Mrs. Campbell, clinical psychologist at Howard University, stated that she gave petitioner "an intelligence quotient or psychological test," and that it disclosed that petitioner's mental age was eleven years and four months, which placed him in the "borderline deficiency" group; she used "the year 15 as the basal age in computing her intelligence test" (R. 83–84, 102). On cross-examination the witness conceded that her examination did not take into account that petitioner "had successfully carried on the work of a chauffeur and butler in the home of an Army officer [for five years], and for some three years had worked successfully for a chemical company" (R. 85). This witness further conceded that she did not know "whether a grown person of a mental age of eleven years and four months could hold a job as a butler and chauffeur. I believe he could be assigned to do work as an exterminator, going around and disinfecting closets in homes and things like that, just routine work with no actual skill required" (R. 86).

Dr. Williams, a neurologist and psychiatrist on the medical faculty of Howard University, also testifying for petitioner, stated that he had given petitioner four examinations, as a result of which he found a "history of dipsomania, chronic alcoholism, over a period of fourteen years, with several arrests; evidence of introversion; lack of aggressiveness prior to drinking which was definitely sublimated on drinking; a history of exaggerated reflexes; a flattening of effect; Veiaguth's fold [found quite frequently in constitutional defects in which the individual is subject to marked depression]; * * * a limitation of information, judgment and comprehension. I think this man shows definitely evidence of what I call a psychopathic personality, and that the alcoholism is but a symptom of the total picture. This picture, so far as the psychopathic personality is concerned, shows the predominantly aggressive type of behavior, purely of an impulsive nature. The fact his memory is good is characteristic of the type of reaction one gets in an aggressive type of psychopath" (R. 86–89).[6]

[6] Evidence was adduced as to whether petitioner was a syphilitic. The defense showed that petitioner had had syphilis in 1942 and 1943 (R. 97), and a witness testified that tests he had performed indicated that petitioner was suffering at the time of the trial in June 1944 from syphilis (R. 96–97). Dr. Williams testified that while he did not participate in the tests, he had heard the testimony in respect of them, and neurosyphilis would furnish a basis for the findings

On direct examination, no opinion was expressed by Dr. Williams as to petitioner's ability to deliberate, but, on cross-examination, in response to questions by the prosecutor, Dr. Williams stated: "I can not answer 'yes' or 'no' whether [petitioner] was of unsound mind at the time he killed Catherine Reardon. I doubt whether he had the ability to distinguish between right and wrong, but I can not answer the question categorically. * * * I think he was unable to resist the impulse to kill her by reason of a deranged mental condition. I doubt whether he was able to entertain an intent to kill her. His inability to entertain that intent was partly due to a deranged mental condition. It is very hard to divorce a mental condition from an emotional condition. * * * it was due mostly to a mental condition. You have here a psychopathic personality associated with chronic alcoholism and with early schizoid tendencies. * * * Chronic alcoholism could be evidence of a psychosis. It is not a mental disease in itself. Schizoic tendency is a mental disease. A person with a psychopathic personality is a borderline case. A psychotic person is a person of unsound mind. * * * Schizoic means a splitting of the per-

---

he had made. He stated, however, that he did not think that petitioner had paresis (R. 97–99). In rebuttal, a government witness testified that tests which the witness had performed on petitioner negatived the finding of syphilis at the time of the trial (R. 99–100; see also R. 100–102).

sonality where the emotional life gradually twists from the normal pattern * * *. A schizoic person is both a sane person and an insane person at different times. At the time [petitioner] killed Miss Reardon he had all the elements of an insane person. He definitely showed signs of impulsive or uncontrollable urge. * * *—I can not answer whether [petitioner] was sane or insane when he killed Miss Reardon by categorical answer 'yes' or 'no'" (R. 90).

In rebuttal, the Government introduced the testimony of Dr. Griffin, senior medical officer at St. Elizabeths Hospital and psychiatrist on the medical faculties of George Washington and Catholic Universities, who stated that he had not examined petitioner but had listened to considerable portions of the testimony of petitioner and Mrs. Campbell, as well as the testimony of Dr. Williams. On the basis of such testimony, Dr. Griffin testified that there was nothing which would lead him to believe that petitioner was of unsound mind, although, in the absence of his examination of petitioner, he would not want to make a definite statement. Dr. Griffin testified that "A psychopathic personality is a person of unsound mind. A person who just shows schizoic tendencies is a person of sound mind"; that about fifty percent of all normal people are schizoid personalities, i. e., "introverts"; that "schizophrenia is a term used by many psychiatrists as

a synonym of dementia praecox, but the terms schizoid tendencies and schizophrenia or schizophrenic tendencies should not be confused"; that "In all probability if you have a person who has been termed a psychopathic personality associated with chronic alcoholism, he is of sound mind"; that he "had no reason to believe [petitioner] didn't have that power of thinking the thing through, making that determination from what I know of the case" and that a person who had the mental age of petitioner was "able to think very nearly as well as a normal person. In other words, they have nearly 80% of intellectual ability." Finally, Dr. Griffin testified that he did not believe petitioner "was set off by automatic impulses * * * probably he was very mad and there was provocation. He might easily have acted under anger without being mentally diseased'" (R. 92–94).

Before counsel summed up to the jury, petitioner offered several prayers for instructions, of which No. 6 was as follows (R. 102):

> The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous,

emotional and physical characteristics as developed by the evidence in the case.

The trial judge refused to grant this instruction, and petitioner excepted (R. 103).

The judge charged the jury that in order to find petitioner guilty of murder in the first degree, the evidence must establish beyond a reasonable doubt that the killing was done with deliberate and premeditated malice. He defined malice as "the intentional striking of a deadly blow in execution of an evil purpose springing from a heart regardless of social duty and fatally bent on mischief"; deliberation as "consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought"; and premeditation as "giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill" (R. 107–109). The judge also submitted to the jury the question of petitioner's guilt of murder in the second degree, which he defined as "the killing of a human being with malice, but without premeditation or deliberation." And, finally, he told the jury that if there was no "malice, or intent to kill, essential to second degree murder," the killing would be reduced to manslaughter (R. 109–110).

The judge also charged the jury that if they believed petitioner was insane, they should acquit

him. He defined insanity as "a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act. * * * If the defendant was suffering from a diseased condition of his mental faculties, which so far destroyed his will, the governing power of the mind, that his actions were not subject to the will, but beyond its control, then in legal contemplation, he was insane and not responsible, though he may have understood the nature of those acts, and have been conscious of their wrong. If * * * there was such lack of will power and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough" (R. 106–107).

SUMMARY OF ARGUMENT

The question is whether it was error for the trial court to fail to instruct the jury that on the issues of deliberation and premeditation, statutory elements of first degree murder, they should consider evidence of petitioner's mental and emotional characteristics, concededly not amounting to legal insanity, for the purpose of reducing the homicide to second degree murder. This Court has never passed on the precise question here presented.

A. Modern criminologists have advanced several considerations for the adoption of the doctrine that mental impairment which does not amount to insanity in the legal sense should be permitted to be utilized in first degree murder cases on the issues of deliberation and premeditation for the purpose of reducing the degree of the homicide. There are, however, compelling reasons, which the criminologists themselves recognize, making against the acceptance of the suggested rule at this time. Additionally, the majority of jurisdictions, including the District of Columbia, have rejected the proposed rule, and have held that borderline mental deficiency cannot serve to lower the degree of homicide. It cannot be said, therefore, that the established rule is outmoded or altogether unreasonable, so as to impel the formulation of a new rule.

B. But even if this Court should regard with favor the proposed rule, the evidence in this case did not reach that degree of specificity which would have permitted the jury to determine that petitioner lacked the capacity to deliberate or to premeditate the homicide. The most that the evidence showed was that petitioner was the kind of person who was apt to conceive and carry into effect a murder because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter the ordinary man.

ARGUMENT

THERE WAS NO ERROR IN THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY THAT PETITIONER'S MENTAL AND EMOTIONAL CHARACTERISTICS, NOT AMOUNTING TO LEGAL INSANITY, SHOULD BE CONSIDERED BY THEM ON THE ISSUES OF DELIBERATION AND PREMEDITATION

In order to convict petitioner of murder in the first degree it was necessary under the statute (p. 2, *supra*) to establish that petitioner killed the deceased with deliberate and premeditated malice. Absent deliberation and premeditation, the killing would be murder in the second degree. Petitioner argues (Pet. 2, 5, 12–16) that his "psychiatric aggressive tendencies, low emotional response and borderline mental deficiency" although concededly insufficient to justify his complete acquittal on the ground of insanity, should, nevertheless, have been submitted to the jury under appropriate instructions for their consideration in determining whether the killing had been committed deliberately and premeditatedly, as required to establish murder in the first degree, or whether he was guilty only of second degree murder. On this basis, he contends, as we understand it, that the trial court committed reversible error in refusing to grant his requested instruction No. 6, i. e., that on the issues of deliberation and premeditation and whether he was of "sound memory and discretion," the jury "should consider the entire personality of the

defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case" (see pp. 12–13, *supra*).

In dealing with this matter, the court below ruled that the instruction was properly refused because it confused the issue of petitioner's sanity in the legal sense with the question of the effect of mental weakness not measuring up to legal insanity, i. e., "whether the psychopathic characteristics of the [petitioner] prevented him from forming the deliberate intent necessary to constitute first degree murder" (R. 116–117).[7] The

[7] It appears to us plain that the instruction was defective for the reason stated by the court below, and also because it did not tell the jury whether the effect of a finding favorable to petitioner on the question of deliberation and premeditation should result in complete absolution or would permit consideration of responsibility for a lesser degree of homicide. It is perhaps questionable whether it was the duty of the trial judge to recast the instruction. But we do not urge that as a basis for sustaining the judgment below. The Circuit Court of Appeals for the Ninth Circuit has held that, in murder cases, a requested instruction, although in part erroneous, imposes the duty on the trial judge to recast the instruction in proper form. *Freihage* v. *United States*, 56 F. 2d 127, 133; *Armstrong* v. *United States*, 41 F. 2d 162, 163. In other criminal cases, it has held that the judge is under no duty to recast an erroneous instruction. *Timell* v. *United States*, 5 F. 2d 901, 902. Several other circuits, as well as the Court of Appeals for the District of Columbia, follow this rule. *George* v. *United States*, 125 F. 2d 559, 563 (App. D. C.); *Kreiner* v. *United States*, 11 F. 2d 722, 731 (C. C. A. 2), certiorari denied, 271 U. S. 688; *Bergera* v. *United States*, 297 Fed. 102, 113 (C. C. A. 8);

court then went on to say that even if the instruction had been phrased properly, there was no evidence justifying the instruction, since "With respect to the issue of deliberation the psychiatric testimony went no further than to say that [petitioner] was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes" (R. 117).[8]

Tillery v. *United States*, 285 Fed. 119 (C. C. A. 5); *Watlington* v. *United States*, 233 Fed. 247, 249 (C. C. A. 8), certiorari denied, 242 U. S. 645; *Blanton* v. *United States*, 213 Fed. 320, 326 (C. C. A. 8). The Circuit Court of Appeals for the Sixth Circuit has held in a mail fraud case that where a requested instruction on an important issue was defective so as technically to justify its refusal, the defect did not relieve the trial court from properly charging the jury on that issue. *McDonald* v. *United States*, 241 Fed. 793, 798–799.

[8] We assume that by the last sentence and by the succeeding paragraph of the opinion, concluding with the sentence, "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law" (R. 117), the court was in effect rejecting petitioner's contention that mental weakness could be utilized to reduce the

Petitioner rests his contention primarily upon the decision of this Court in 1881 in *Hopt* v. *People*, 104 U. S. 631. There the defendant had been convicted in the Territory of Utah of murder in the first degree, which was defined by the Utah Code as follows: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing * * * is murder in the first degree." The Utah Code also provided that while voluntary intoxication was not a defense to crime, "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that

---

degree of the homicide. The proceedings in the trial court had made it clear that petitioner was not seeking a complete absolution but was claiming that because of his mental condition he could be guilty of not more than second-degree murder, and that the trial court rejected that claim (see R. 11–12, 64–69; compare also the petition for rehearing below, R. 119–120). Moreover, in 1886 the Supreme Court of the District of Columbia, sitting in General Term, held, on appeal, that no error was committed in the rejection of a quite analogous requested instruction, saying, "It rests upon the idea that there is a grade of insanity not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder. The law does not recognize any such distinction as that in the forms of insanity." *United States* v. *Lee*, 15 D. C. (4 Mackey) 489, 495–496. It should be mentioned, however, that at that time the District of Columbia statute did not provide for degrees of murder.

the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." The trial court refused to instruct the jury that they were entitled to consider the defendant's intoxication upon the question "whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime." This Court held that the refusal to give the instruction was error, saying, "when a statute * * * requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury" (104 U. S. at 634).[9] Peti-

[9] The *Hopt* case was referred to in *Tucker* v. *United States*, 151 U. S. 164, and *Winston* v. *United States*, 172 U. S. 303, 311. In the *Tucker* case it was said that the *Hopt* case "went no further in favor of admitting evidence of intoxication than to hold that a defendant, indicted under a territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation" (151 U. S. at 169).

The majority of courts, including those of the District of Columbia, follow the rule on intoxication enunciated in the *Hopt* case. See *McAffee* v. *United States*, 111 F. 2d 199, 205 (App. D. C.), certiorari denied, 310 U. S. 643; *Bishop* v. *United States*, 107 F. 2d 297, 301 (App. D. C.); *State* v. *Kupis*, 37 Del. 27, 30–31 (1935); *State* v. *Wilson*, 11 N. W. 2d 737 (Ia., 1943); *Tate* v. *Commonwealth*, 258 Ky. 685, 695 (1935); *Com-*

tioner argues that "if intoxication voluntarily induced and carried to such a degree that the accused is incapable of deliberating can reduce the crime from murder in the first degree to murder in the second degree, it certainly would appear that disease and congenital defects which the accused can neither prevent nor cure should have under similar circumstances no less effect" (Pet. 14).

Our position is as follows: (A) While there are several considerations which may be advanced for the proposition that mental weakness or impairment, not amounting to insanity in the legal sense, should be permitted to be utilized for the purpose of reducing first-degree murder to a lesser degree of homicide, there are, on the other hand, factors which at the present time outweigh, in our opinion, those considerations; and (B), even if this Court should feel that mental weakness may be utilized to reduce the

---

monwealth v. *Soaris*, 275 Mass. 291, 299–300 (1931); *People* v. *Koerber*, 244 N. Y. 147, 151 (1926); *People* v. *Leonardi*, 143 N. Y. 360, 366 (1894); *Commonwealth* v. *Kline*, 341 Pa. 238, 240 (1941); *Commonwealth* v. *Lehman*, 309 Pa. 486, 499 (1932); *Gills* v. *Commonwealth*, 141 Va. 445, 451 (1925); *Lasecki* v. *State*, 190 Wis. 274, 279–280 (1926). See also Weihofen, *Insanity as a Defense in Criminal Law* (1933), pp. 90–91.

But the rule has been held not to permit a reduction of the crime to voluntary manslaughter. *Nestlerode* v. *United States*, 122 F. 2d 56, 59–60 (App. D. C.); *Commonwealth* v. *Soaris*, 275 Mass. 291, 299–300 (1931); *Commonwealth* v. *Taylor*, 263 Mass. 356, 363 (1928); *Cody* v. *Commonwealth*, 180 Va. 449, 452 (1942); *Gills* v. *Commonwealth*, 141 Va. 445, 451 (1925).

degree of a homicide, the evidence in this case does not call for the application of such a rule.

A. THIS COURT SHOULD NOT AT THIS TIME PERMIT MENTAL WEAKNESS, NOT AMOUNTING TO LEGAL INSANITY, TO REDUCE A FIRST DEGREE MURDER TO A LESSER DEGREE OF HOMICIDE

The legal tests of insanity warranting acquittal which have been embodied in instructions approved by this and other federal courts are as follows: (1) That the defendant's mental condition is so deranged by reason of mental disease that he is incapable of distinguishing between right and wrong; or (2) that he is unconscious of the nature of the act he has committed; or (3) that, while conscious of its nature and able to distinguish between right and wrong and to know that the act is wrong, yet his will has been so completely destroyed by mental disease that his actions are not subject to his will.[10]

Two modifications of these tests have been sought. One, which has been universally rejected by the courts of this country, is that the law should permit mental weakness or impairment which does not rise to the level of legal insanity

[10] See *Matheson* v. *United States*, 227 U. S. 540, 543; *Hotema* v. *United States*, 186 U. S. 413, 419; *Davis* v. *United States*, 165 U. S. 373, 378; *Holloway* v. *United States*, 148 F. 2d 665, 666 (App. D. C.); *Smith* v. *United States*, 36 F. 2d 548 (App. D. C.); *United States* v. *Fore*, 38 F. Supp. 140 (S. D. Calif.); cf. *Ritter* v. *Mutual Life Insurance Co.*, 169 U. S. 139, 150–151; *New York Life Ins. Co.* v. *King*, 93 F. 2d 347, 353–354 (C. C. A. 8).

to be utilized as a defense to criminal conduct."[11] In refusing to regard borderline mental unsoundness as an excuse for criminality, the courts have been motivated by two considerations: the protection of society against criminal offenders, and the difficulty of reconciling the point of view of

[11] *Holloway* v. *United States*, 148 F. 2d 665, 666 (App. D. C.); *Travers* v. *United States*, 6 App. D. C. 450, 464; *State* v. *Macias*, 60 Ariz. 93, 100 (1942); *Daniels* v. *State*, 186 Ark. 255, 259 (1932); *Chriswell* v. *State*, 171 Ark. 255, 259 (1926); *People* v. *Kimball*, 5 Cal. (2d) 608, 610 (1936); *People* v. *Dugger*, 5 Cal. (2d) 337, 341 (1936); *People* v. *Perry*, 195 Cal. 623, 639 (1925); *People* v. *Norton*, 138 Cal. App. 70, 74 (1934); *Rozier* v. *State*, 185 Ga. 317, 320–321 (1938); *Bowden* v. *State*, 151 Ga. 336, 338–340 (1921); *People* v. *Marquis*, 344 Ill. 261, 267 (1931); *Foster* v. *State*, 222 Ind. 133, 136–137 (1944); *McCutcheon* v. *State*, 199 Ind. 247, 259 (1927); *Wartena* v. *State*, 105 Ind. 445, 450 (1885); *State* v. *Flowers*, 58 Kan. 702, 705 (1897); *Cline* v. *Commonwealth*, 248 Ky. 609, 613 (1933); *State* v. *Tapie*, 173 La. 779, 787 (1931); *Commonwealth* v. *Devereaux*, 257 Mass. 391, 397 (1926); *Commonwealth* v. *Stewart*, 255 Mass. 9, 13 (1926); *State* v. *Pinski*, 163 S. W. 2d 785 (Mo., 1942); *State* v. *Jackson*, 346 Mo. 474, 481 (1940); *State* v. *Schlaps*, 78 Mont. 560, 578 (1927); *People* v. *Former*, 194 N. Y. 251, 265 (1909); *People* v. *Burgess*, 153 N. Y. 561, 569 (1897); *Patterson* v. *People*, 46 Barbour (N. Y.) 625, 633 (1866); *People* v. *Irwin*, 166 Misc. (N. Y.) 751, 754 (1938); *Commonwealth* v. *McCausland*, 348 Pa. 275, 277–278 (1944); *Commonwealth* v. *Szachewicz*, 303 Pa. 410, 416 (1931); *Commonwealth* v. *Cressinger*, 193 Pa. 326, 338 (1899); *Taylor* v. *Commonwealth*, 109 Pa. 262, 271 (1885); *Woodruff* v. *State*, 164 Tenn. 530, 547 (1932); *Banks* v. *State*, 133 Tex. Cr. Rep. 541, 542–543 (1938); *McKenny* v. *State*, 105 Tex. Cr. Rep. 353, 355 (1926); *Parker* v. *State*, 91 Tex. Cr. Rep. 68, 74 (1922); *State* v. *Schafer*, 156 Wash. 240, 252–253 (1930); *State* v. *Johnson*, 233 Wis. 668, 670–673 (1940).

the psychiatrist with the concept of responsibility which is foundational in our criminal law. The first consideration was thus expressed in *State* v. *Flowers*, 58 Kan. 702, 705 (1897): "Whenever moral weakness or an uncontrollable propensity to do wrong is accepted as an excuse for crime, there will be little room for conviction of offenders. No person of moral strength and a well-balanced mind commits crime. All wrong-doing is the result of ignorance and mental and moral defects. Yet society must protect itself and restrain the criminal classes."

The second consideration was stated in *Holloway* v. *United States*, 148 F. 2d 665, 667 (App. D. C.), by the author of the opinion below in the instant case, as follows:

> The modern science of psychology is concerned with diagnosis and therapeutics and not with moral judgments. It proceeds on an entirely different set of assumptions. It does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go. The tendency of psychiatry is to regard what ordinary men call reasoning as a rationalization of behavior rather than the real cause of behavior. From this point of view psychiatrists probe behind what ordinary men call the "reasoning" of an abnormal personality. This tends to restrict the area

of moral judgment to an extent that offends our traditional idea that an offender who can talk and think in rational terms is morally responsible for what he does.

And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all directions with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane.

While modern criminologists apparently do not, in terms, urge that mental weakness should absolve completely of criminal responsibility, they fit the experience of modern psychiatry into the legal framework by applying it to the requirements of those crimes which involve a specific intent, particularly murder in the first degree, with its elements of "deliberation" and "premedi-

tation",[12] and, on this basis, advocates in the case of homicide an amelioration of the tests of criminal responsibility by holding the borderline defective culpable merely of some lesser degree of the crime. Their arguments in favor of the proposed rule may be summarized as follows:

(1) They say—and of course it cannot be disputed—that the legal concept that an offender is either wholly sane or wholly insane is unrealistic. The psychiatrists tell us, and common sense makes it evident, that the world cannot be carved into two parts, putting on the one side those who are sane and on the other those who are insane.[13]

[12] See Wharton, *Criminal Law* (12th ed.), vol. 1, sec. 64; Weihofen, *Insanity as a Defense in Criminal Law* (1933), pp. 100–103; Weihofen, *Partial Insanity and Criminal Intent*, 24 Ill. Law Rev. 505 (1930); Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. of Pa. Law Rev. 426, 450 (1939); Keedy, *Insanity and Criminal Responsibility*, 30 Harv. Law Rev. 535, 552–554 (1917); Note, 79 U. of Pa. Law Rev. 209 (1930); Abrahamsen, *Crime and the Human Mind* (1944), p. 186; *Mental Abnormality and Crime*, *English Studies in Criminal Science* (1944), pp. 61–63; Glueck, *Mental Disorder and the Criminal Law* (1925), pp. 199–208, p. 310, footnote 1.

[13] See White, *Insanity and the Criminal* Law (1923), p. 89: "To conceive that an individual is either absolutely responsible or absolutely irresponsible is to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the Middle Ages that a person is possessed of a devil or is not possessed of a devil, and therefore is or is not a free moral agent." See also Hoag, *Crime, Abnormal Minds and the Law* (1923), p. 77; Healy, *The Individual Delinquent* (1917), p. 30; Grasset, *The Semi-Insane and the Semi-Responsible* (Eng. Transl. by Jelliffe, 1907), p. 349.

There are, the psychiatrists say, almost imperceptible graduations between the states of total sanity and total insanity."[14]

(2) More precisely, the penologists assert, based on the experience of psychiatry, that a person may be able to distinguish right from wrong, know that a particular act is morally reprehensible and legally punishable, and have will power enough so that he cannot be said to suffer from an irresistible impulse, and still be deficient in his powers of deliberation and judgment, or of inhibition and self-control. To permit jury consideration to be given to this deficiency is but another application of the principle which has long been part of our criminal law, the principle that circumstances may interfere with the ordinary operation of a person's mind and render him incapable of the mental state which the law will ordinarily imply from the act. In this respect they call attention to intoxication and "heat of blood", or provocation, which, when found to exist, may be taken into consideration by the jury, not as mitigating circumstances, but to show that the defendant, by reason of such intoxication or passion, was incapable of the specific intent required to constitute, with the given act, the higher crime.

(3) It is wholly illogical to permit intoxication to reduce the degree of crime and to exclude a

[14] See the authorities cited in footnote 12, *supra*, p. 26.

mental deficiency. Writing for the minority in *State* v. *Martin*, 102 N. J. L. 388, 403–404 (1926), Kalisch, J., said: "It is an abhorrent idea to contemplate that in a case of intoxication resulting, even from the voluntary act of the person; if by reason of such intoxication his mind is in such a state that he cannot form an intent to take life or to deliberate, or to premeditate, a jury should take that factor into consideration and may convict him of murder in the second degree, whilst if a person is afflicted with a mental disease, the act of God, a jury may not take that factor into consideration on the question of premeditation, deliberation, willfulness or intent, and must convict the defendant of murder in the first degree if he fails to satisfy the jury that his mental condition was such that at the time of the commission of the act he did not understand the nature of the act which he was doing, and was unable to distinguish right from wrong."

(4) The "partial insanity" doctrine is in accord with the precept of modern penology to make the punishment fit the criminal rather than the crime. Justice to the offender, it is argued, requires that the punishment should be proportioned not simply to the objective seriousness of the crime but also to the relative culpability of the criminal, taking into account all the mitigating circumstances, subjective as well as objective.

(5) Under the present legal tests of insanity, which do not permit individualization, the jury

will in most cases simply disregard the complex classifications of the degrees of murder and manslaughter and convict the defendant of that degree of crime which will subject him to what the jury thinks is the proper punishment in the light of elements which are legally irrelevant; indeed, they will often acquit the defendant where his case is one which appeals to the sympathy of the jury. The results are not only an illogical verdict when the case merits a scientific and logical verdict, but, more important, the danger to society which arises where, as a result of the jury's verdict, a mental defective is either released immediately or sooner than he should be.[15]

But the criminologists themselves admit that however logical may appear to be the adoption of the doctrine which they advocate, there are serious difficulties which would attend its acceptance. These and other objections, which we think outweigh the considerations for acceptance, may be summarized as follows:

(1) Not only would the jury have to determine the existence in the defendant of the borderline disorder, of itself not an easy task, but even if it could say with some degree of certainty that such

[15] These arguments, as well as various objections to the suggested rule, are in the main summarized in the article by Weihofen in 24 Ill. Law Rev. 505, and in his later book, "*Insanity as a Defense in Criminal Law*" (1933), pp. 100–103, 413–415.

a condition exists, it would then have to answer the still more difficult question whether such disorder rendered the defendant incapable of the specific intent required by the crime charged. It is conceded by proponents of the suggested rule that the bearing of the mental disorder upon the crime committed is not something which can be determined with any degree of precision; the most that can be expected is that there is a probability of connection between the crime committed and the mental condition.[16] Also, it is difficult to conceive how a defendant may be able to distinguish right from wrong, know that a particular act is reprehensible morally and legally, and have the will to resist the commission of the act, and still

[16] See Weihofen, 24 Ill. Law. Rev., p. 513, and also footnote 23 on the same page. Indeed, in footnote 48, on pp. 521–522 of his article, Weihofen, referring to Garofalo's "Criminology" (Eng. Trans. by Millar (1924), p. 273 et seq.), states: "It is impossible, he insists, to distinguish what act is the result of circumstances, environment or heredity and what is the result of free will. To determine this question, we should not only have to know his [the defendant's] whole life history, in all its intimate details, but also that of his ancestors, and in addition, we should have to examine the structure of his brain, which is possible only by an autopsy." Professor Hall in his recent article, *Mental Disease and Criminal Responsibility*, 45 Col. Law Rev. 677, 683 (1945), states: "* * * the chief limitation on any solution of the problems arising from mental disease is the lack of medical and psychiatric knowledge of mental disease"; and Dr. Abrahamsen in his book, *Crime and the Human Mind* (1944), p. 26, states, "there has been no real psychiatric insight into criminalistic behavior."

not have enough judgment to "premeditate" or "deliberate." Cf. *Commonwealth* v. *Wireback,* 190 Pa. 138, 151–152 (1899).

(2) The analogies to intoxication and provocation, which the criminologists use as a lever, both arise out of objective facts, drinking and adequate basis for anger or fury, matters easily comprehended by a jury, whereas mental weakness is purely a subjective condition, at all times difficult to prove and frequently giving rise to such a diversity of expert opinion as to result in nothing but confusion.

(3) The suggested rule, as is pointed out by the court below at R. 117, acquits of murder in the first degree the very type of person who is most apt to commit such a crime, i. e., the person with psychiatric aggressive tendencies and a low emotional response to situations which would deter the ordinary man. See *Sindram* v. *People,* 88 N. Y. 196, 201 (1882).

(4) If adopted, there is no logical reason why the proposed rule should be restricted to murder in the first degree, with its elements of premeditation and deliberation. It should be extended to those other degrees of homicide which require some evil purpose and, indeed, to any crime which requires a specific intent. Concededly the effect of the adoption of any such rule upon our criminal law would be revolutionary, and would re-

sult, additionally, in turning loose upon society the borderline mental deficient immediately or at least sooner than a sane, and perhaps less dangerous, criminal. This, the criminologists admit, would require the devising of new methods, not now embodied in our law, for the treatment and punishment of the borderline defective.[17]

(5) This Court is not ordinarily moved to impose a new rule unless the old one is outmoded and unreasonable. Cf. *Funk* v. *United States*, 290 U. S. 371, 381; *Weiler* v. *United States*, 323 U. S. 606, 609–610. In view of the present state of the authorities on the precise question, it can hardly be said that this is so. In addition to the present case there are some 48 American de-

[17] In his article in 24 Ill. Law Rev. at p. 526, Weihofen states: "This treatment * * * should not end with the expiration of the period of sentence. To release such an unbalanced criminal after he has served his term would be about as logical as to order a smallpox patient to the hospital for two weeks, and then turn him out, whether cured or not. After the partially insane criminal has been detained in prison (or as suggested above, in some half-way institution for such cases, or special ward connected with the prison) for the term of his sentence, he should be retained as a patient dangerous to be at large, either under indeterminate or permanent segregation.

"That scientific treatment and detention of these borderline cases must be continued after sentence has expired cannot be too strongly emphasized. Without such procedure, the social result of the doctrine would only be to speed up the 'in again, out again' record of psychopathic habitual criminals * * * ".

cisions dealing with the subject. In 27 of them the suggested rule has been rejected;[18] in 21 of them it has been accepted, although some of the decisions are not too clear.[19] As to the jurisdictions, it would seem that 9 have rejected the pro-

[18] *United States* v. *Lee*, 15 D. C. (4 Mackey) 489, 495–496 (1886); *Foster* v. *State*, 37 Ariz. 281, 289–290 (1930); *Bell* v. *State*, 120 Ark. 530, 557–558 (1915); *People* v. *French*, 12 Cal. 2d 720, 738 (1939); *People* v. *Cordova*, 14 Cal. (2d) 308, 312–313 (1939); *People* v. *Troche*, 206 Cal. 35, 47 (1928); *State* v. *Van Vlack*, 57 Idaho 316, 360–367 (1937); *Sage* v. *State*, 91 Ind. 141, 144–145 (1883); *Perciful* v. *Commonwealth*, 212 Ky. 673, 678 (1925); *Spencer* v. *State*, 69 Md. 28, 41–43 (1888); *Commonwealth* v. *Cooper*, 219 Mass. 1, 5 (1914); *State* v. *Paulsgrove*, 203 Mo. 193, 206 (1907); *State* v. *Holloway*, 156 Mo. 222, 231 (1900); *State* v. *Rodia*, 132 N. J. L. 199 (1944); *State* v. *Noel*, 102 N. J. L. 659, 676–677 (1926); *State* v. *Martin*, 102 N. J. L. 388, 402–404 (1926); *State* v. *James*, 96 N. J. L. 132 (1921); *State* v. *Maiorana*, 78 N. J. L. 339 (1909); *Sindram* v. *People*, 88 N. Y. 196, 200–201 (1882); *Commonwealth* v. *Barner*, 199 Pa. 335, 342 (1901); *Commonwealth* v. *Hollinger*, 190 Pa. 155, 160 (1899); *Commonwealth* v. *Wireback*, 190 Pa. 138, 151–152 (1899); *Jacobs* v. *Commonwealth*, 121 Pa. 586, 592–593 (1888); *Commonwealth* v. *Scott*, 14 Penna. District & County Rep. 191 (1930); *Witty* v. *State*, 75 Tex. Cr. Rep. 440, 457 (1914); *Hogue* v. *State*, 65 Tex. Cr. Rep. 539, 542 (1912); *State* v. *Schneider*, 158 Wash. 504, 510–511 (1930).

[19] *State* v. *Saxon*, 87 Conn. 5, 14–15 (1913); *Andersen* v. *State*, 43 Conn. 514, 526 (1876); *State* v. *Johnson*, 40 Conn. 136, 143–144 (1873); *Fisher* v. *People*, 23 Ill. 283, 295 (1860); *Donahue* v. *State*, 165 Ind. 148, 156 (1905); *Aszman* v. *State*, 123 Ind. 347, 356 (1889); *Maulding* v. *Commonwealth*, 172 Ky. 370, 380 (1916); *Rogers* v. *Commonwealth*, 96 Ky. 24, 28 (1894); *Mangrum* v. *Commonwealth*, 19 Ky. Law Rep. 94 (1897); *Commonwealth* v. *Clark*, 292 Mass. 409, 414 (1935); *Commonwealth* v. *Trippi*, 268 Mass. 227, 231 (1929); *State* v. *Close*, 106

posed rule: District of Columbia, Arizona, Arkansas, California, Idaho, Maryland, Missouri, Texas, and Washington. It would also seem that New Jersey and Pennsylvania have rejected the rule; Indiana, Kentucky, Massachusetts, and New York are in a doubtful category. On the other hand, the rule appears to have been accepted in Connecticut, Illinois Rhode Island, Utah, Virginia,

---

N. J. L. 321, 324 (1930); *State* v. *Schilling*, 95 N. J. L. 145, 148 (1920); *People* v. *Moran*, 249 N. Y. 179, 180 (1928); *Jones* v. *Commonwealth*, 75 Pa. 403, 408 (1874); *State* v. *Fenik*, 45 R. I. 309, 315 (1923); *State* v. *Green*, 78 Utah 580, 602 (1931); *State* v. *Anselmo*, 46 Utah 137, 145, 157 (1915); *Dejarnette* v. *Commonwealth*, 75 Va. 867, 880–881 (1881); *Oborn* v. *State*, 143 Wis. 249, 272 (1910); *Hempton* v. *State*, 111 Wis. 127, 135 (1901).

We have discovered no English cases on the subject. It is stated in Halsbury's *Laws of England* (2d ed.) Vol. 9, p. 22: "Insanity is not an absolute defence in the case of a person charged with a crime. If insanity is proved in such a case, a jury cannot now, as they could formerly, acquit the accused, but they may bring in a special verdict that he was guilty of the act or omission charged against him, but was insane at the time when the act was done or the omission made. The result of this verdict is that the Court orders the accused to be kept in custody as a criminal lunatic, till the King's pleasure is known." The Scotch courts hold that a weak or diseased state of mind not amounting to insanity may be considered by the jury to reduce a killing from murder to culpable homicide. See *H. M. Advocate* v. *Muir* (1933) S. L. T. R. 403; *H. M. Advocate* v. *Savage*, 61 S. L. R. 12 (1923); *H. M. Advocate* v. *Edmonstone*, 47 S. L. R. 7 (1909); *H. M. Advocate* v. *Ferguson*, 19 S. L. R. 341 (1882); *H. M. Advocate* v. *Granger*, 16 S. L. R. 253 (1878).

and Wisconsin.[20] Some of the courts which have rejected the suggested rule have not been persuaded by the intoxication analogy upon which the criminologists place such strong reliance. See *Spencer* v. *State*, 69 Md. 28, 41–42 (1888); *State* v. *Noel*, 102 N. J. L. 659, 676–677, 693–694 (1926); *State* v. *James*, 96 N. J. L. 132, 152 (1921); *Commonwealth* v. *Hollinger*, 190 Pa. 155, 160–161 (1899); *Commonwealth* v. *Scott*, 14 Pa. District & County Rep. 191, 198 (1930).

---

[20] Weihofen, writing in 1933, stated that the broader view "seems to have been adopted in some eight or nine states [Connecticut, Indiana, New Jersey, New York (dictum), Rhode Island, Tennessee, Utah, Virginia, Wisconsin]. The rule has been rejected in seven jurisdictions [Arkansas, California, District of Columbia, Massachsetts, Missouri, Pennsylvania, Washington], and three others are doubtful [Illinois, Kentucky, Texas]. *Insanity as a Defense in Criminal Law*, pp. 100–101. Glueck in 1925 recognized only two states, New Jersey and Utah, as adopting the broader view. Glueck, *op. cit.*, p. 203. Miller, *Criminal Law*, p. 134 (1934) states: "Most courts * * * have refused to consider 'mere weakness of mind' as an excuse for crime or to reduce the degree of crime."

The first of the two Wisconsin decisions which enunciated the rule, *Hempton* v. *State*, 111 Wis. 127, was predicated largely upon the language of this Court in the *Hopt* case, 104 U. S. 631, which referred to "drunkenness or otherwise" (see *supra* p. 20). The Wisconsin court apparently assumes that this Court was speaking of any circumstance which produced a disordered intellect, including mental deficiency. However, it should be noted that in the *Hopt* case the precise condition involved was drunkenness.

Although no objection as to the form of these instructions is urged here by counsel for petitioner, this Court in a criminal case may notice material error within its power to correct even though that error is not specifically challenged and certainly should do

---

not guilty by reason of insanity, the defendant at most is guilty only of second degree murder or manslaughter, according as you may find he acted with or without malice.

"Insanity, according to the criminal law, is a disease or defect of the mind which renders one incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act. There must be actual disease or defect of the mental faculties, so far impairing the reason or will that this test of sanity cannot be met, before one is relieved of his criminal act.

"The fatal actions must be traceable back to a diseased or deranged mentality."

Irresistible impulse. "Here it is contended that although the defendant may have understood what he was doing when he assaulted Miss Reardon, and may have known it was wrong, yet he was impelled by an irresistible impulse to do the violent acts which caused her death.

"If the defendant was suffering from a diseased condition of his mental faculties, which so far destroyed his will, the governing power of the mind, that his actions were not subject to the will, but beyond its control, then in legal contemplation, he was insane and not responsible, though he may have understood the nature of those acts, and have been conscious of their wrong.

"If, as I have said, there was such lack of willpower and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough."

Malice; Deliberation; Premeditation. "I have stated that the indictment presents within its terms the three degrees of unlawful homicide—murder in the first degree, murder in the second degree, and manslaughter.

"I shall explain them in that order.

"Murder in the first degree is the killing of a human being purposely and with deliberate and premeditated malice. The crime involves these elements:

"First, the fatal act purposely done. Of that, nothing more need be said.

"Second, malice.

"Third, premeditation.

"Fourth, deliberation.

"All these are elements which go to constitute the crime of murder in the first degree. Therefore, each and all must be established by the evidence beyond a reasonable doubt.

"Malice is a basic element of murder in both the first and the second degrees.

"In common parlance, the word signifies feelings of anger, hatred, or illwill. Such feelings, may, of course, actuate the killing of a human being, and often do.

"However, the law has given to the term 'malice' a special meaning. It is the intentional doing of a wrongful act to the injury of another under circumstances which do not legally justify, or palliate the act.

"As applied to the crime of murder, malice is the intentional striking of a deadly blow in execution of an evil purpose springing from a heart regardless of social duty and fatally bent on mischief.

"Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite

so, even in cases from the District of Columbia, where life is at stake. *Brasfield* v. *United States*, 272 U. S. 448; compare Rules 54(a)(1), 59, 52(b), Rules of Criminal Procedure. It is suggested by a dissent that these instructions, just quoted in note 3, did not bring "sharply and vividly to the jury's mind" the issue of premeditation; that they "consisted of threadbare generalities, a jumble of empty abstractions." We think the contention advanced is that the district judge should have specifically referred to the words of insult or have elaborated upon the details of the evidence in his charge with respect to premeditation. With such a requirement for instructions we do not agree. The evidence furnishes the factual basis for a jury's conclusion as to guilt and its degree, guided by the instructions of the court as to the law.[4] Premeditation and deliberation were defined carefully by the instructions. The contention of the accused that there was no deliberation or premeditation was called distinctly to the jury's attention. The necessary time element was emphasized and the jury was told that premeditation required a preconceived design to kill, a "second thought." With the evidence and the law before them the jury reached its verdict. The instructions, we think, were clear, definite, understandable and applicable to the facts developed by the testimony. We see no error in them.

The error claimed by the petitioner is limited to the refusal of one instruction. The jury might not have reached the result it did if the theory of partial responsibility[5] for his acts which the

---

decision to kill. In short, premeditation is the formation of a specific intent to kill.

"Deliberation, that term of which you have heard much in the arguments, and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

"Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.

"The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued."

[4] Stilson *v.* United States, 250 U. S. 583, 588; Starr *v.* United States, 153 U. S. 614, 625; Arwood *v.* United States, 134 F. 2d 1007, 1011.

[5] The phrase is used herein to indicate responsibility for a lesser grade of offense. See Glueck, Mental Disorder and the Criminal Law (1925) 310, n. 1.

petitioner urges had been submitted. Petitioner sought an instruction from the trial court which would permit the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and the accused's capacity for premeditation and deliberation.[6] The appellate court approved the refusal upon the alternate ground that an accused is not entitled to an instruction upon petitioner's theory.[7] This has long been the law of the District of Columbia.[8] This is made abundantly clear by *United States* v. *Lee*, 4 Mackey 489, 495. This also was a murder case in which there was evidence of mental defects which did not amount to insanity. An instruction was asked and denied in the language copied in the margin.[9]

It is suggested that the *Lee* case was decided when murder under the District law was not divided into degrees and that therefore it was not proper to instruct as to the accused's mental capacity to premeditate and deliberate while now it would be. We do not agree.

---

[6] The instruction requested reads as follows:

"The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case."

Our conclusion does not require that we pass upon whether the instruction was correct if petitioner's theory is sound, or whether, if incorrect, the judge should have recast the instruction in proper form. See the case below, 149 F. 2d 28, 29 n. c. Compare Freihage v. United States, 56 F. 2d 127, 133, with George v. United States, 125 F. 2d 559, 563.

[7] Fisher v. United States, 149 F. 2d 28, 29 l. c.

The Court of Appeals spoke of an acquittal under the proposed instruction. The other language of the opinion and the refusal of the petition for rehearing, which pointed out the misuse of the word, shows clearly that a reduction in degree was meant, not an acquittal.

[8] Cf. Guiteau's Case, 10 Fed. 161, 168, 182; Bolden v. United States, 69 F. 2d 121; Owens v. United States, 85 F. 2d 270, 272.

[9] 4 Mackey 495-96:

The instruction requested was: "'If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of judging between right and wrong; yet if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter.'"

The court said: "It rests upon the idea that there is a grade of insanity

The separation of the crime of murder into the present two degrees by the code of law for the District of Columbia, March 3, 1901, 31 Stat. 1189, 1321, is not significant in analyzing the necessity for the proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instruction. The reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment. Cf. *Davis* v. *Utah Territary*, 151 U. S. 262, 267, 270. Homicide, at common law, the rules of which were applicable in the District of Columbia, had degrees. Murder was "with malice aforethought, either express or implied." *Hill* v. *United States*, 22 App. D. C. 395, 401; *Hamilton* v. *United States*, 26 App. D. C. 382, 386-91; *Burge* v. *United States*, 26 App. D. C. 524, 527-30. Manslaughter was unlawful homicide without malice. Blackstone, Book IV, p. 191. As capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here,[10] it cannot properly be said that the separation of murder into degrees introduced a new situation into the law of the District of Columbia.[11] As shown by the action of the District of Columbia courts in this case and the other District cases cited in this and the

---

not sufficient to acquit the party of the crime of manslaughter and yet sufficient to acquit him of the crime of murder.

"The law does not recognize any such distinction as that in the forms of insanity. The rule of law is very plain that in order that the plea of insanity shall prevail, there must have been that mental condition of the party which disabled him from distinguishing between right and wrong in respect of the act committed.

"Now if the prisoner was so far capable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong in respect of the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favors any such idea. The prayer therefore is unsound in all respects, and even if it had been sound, not being supported by evidence, the court below was entirely justified in rejecting it."

[10] See Hart v. United States, 130 F. 2d 456, 458; Bishop v. United States, 107 F. 2d 297, 302-3; McHargue v. Commonwealth, 231 Ky. 82; State v. Eaton, 154 S. W. 2d 767 (Mo.).

[11] The reference to the establishment of degrees of murder in Hopt v. People, 104 U. S. 631, 634, may indicate a different point of view. The Court was there considering intoxication under a statutory requirement that the intoxication should be taken into consideration by the jury in determining the degree of the offense.

preceding paragraph, we think it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder.

Petitioner urges forcefully that mental deficiency which does not show legal irresponsibility should be declared by this Court to be a relevant factor in determining whether an accused is guilty of murder in the first or second degree, upon which an instruction should be given, as requested. It is pointed out that the courts of certain states have adopted this theory. Others have rejected it.[12] It is urged, also, that since evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (*McAffee* v. *United States*, 111 F. 2d 199, 205 r. c.), courts from this must deduce that disease and congenital defects, for which the accused may not be responsible, may also reduce the crime of murder from first to second degree. This Court reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness in lan-

[12] We are indebted to the respondent's brief for the collection of cases. Those accepting the petitioner's theory are: Andersen v. State, 43 Conn. 514, 526 (1876); State v. Johnson, 40 Conn. 136, 143-44 (1873); Fisher v. People, 23 Ill. 283, 295 (1860); Donahue v. State, 165 Ind. 148, 156 (1905); Aszman v. State, 123 Ind. 347, 356 (1889); Rogers v. Commonwealth, 96 Ky. 24, 28 (1894); Mangrum v. Commonwealth, 19 Ky. Law Rep. 94 (1897); Commonwealth v. Trippi, 268 Mass. 227, 231 (1929); State v. Close, 106 N. J. L. 321, 324 (1930); State v. Schilling, 95 N. J. L. 145, 148 (1920); People v. Moran, 249 N. Y. 179, 180 (1928); Jones v. Commonwealth, 75 Pa. 403, 408, 410 (1874); State v. Green, 78 Utah 580, 602 (1931); State v. Anselmo, 43 Utah 137, 145, 157 (1915); Dejarnette v. Commonwealth, 75 Va. 867, 880-81 (1881); Hempton v. State, 111 Wisc. 127, 135 (1901).

Those rejecting it are: United States v. Lee, 15 D. C. (4 Mackey) 489, 495-96 (1886); Foster v. State, 37 Ariz. 281, 289-90 (1930); Bell v. State, 120 Ark. 530, 557-58 (1915); People v. French, 12 Cal. 2d 720, 738 (1939); People v. Cordova, 14 Cal. 2d 308, 311-12 (1939); People v. Troche, 206 Cal. 35, 47 (1928); State v. Van Vlack, 57 Idaho 316, 360-67 (1937); Sage v. State, 91 Ind. 141, 144-45 (1883); Spencer v. State, 69 Md. 28, 41-43 (1888); Commonwealth v. Cooper, 219 Mass. 1, 5 (1914); State v. Halloway, 156 Mo. 222, 231 (1900); State v. Rodia, 132 N. J. L. 199 (1944); State v. Noel, 102 N. J. L. 659, 676-77 (1926); State v. James, 96 N. J. L. 132, 149-51 (1921); State v. Maioni, 78 N. J. L. 339 (1909); Sindram v. People, 88 N. Y. 196, 200-201 (1882); Commonwealth v. Barner, 199 Pa. 335, 342 (1901); Commonwealth v. Hollinger, 190 Pa. 155, 160 (1899); Commonwealth v. Wireback, 190 Pa. 138, 151-52 (1899); Jacobs v. Commonwealth, 121 Pa. 586, 592-93 (1888); Commonwealth v. Scott, 14 Penna. District & County Rep. 191 (1930); Witty v. State, 75 Tex. Cr. Rep. 440, 457 (1914); Hogue v. State, 65 Tex. Cr. Rep. 539, 542 (1912); State v. Schneider, 158 Wash. 504, 510-11 (1930).

guage which has been said to be broad enough to cover mental deficiency. *Hopt* v. *People*, 104 U. S. 631, 634.[13] It should be noted, however, that the Territory of Utah had a statute specifically established such a rule.[14]

No one doubts that there are more possible classifications of mentality than the sane and the insane. White, Insanity and the Criminal Law 89. Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.[15] Congress took a forward step in defining the degrees of murder so that only those guilty of deliberate and premeditated malice could be convicted of the first degree. It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility.

We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by Constitutional limitations or a general federal law is a matter

[13] 104 U. S. at 634: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

See Edwin R. Keedy, Insanity and Criminal Responsibility, 30 Harv. L. Rev. 535 at 552.

The cases cited by this Court to support this statement are all instances of intoxication. Since drunkenness alone is specifically mentioned, the "or otherwise" may refer to various stages of intoxication.

[14] See 104 U. S. 631 at 634.

[15] Wharton, Criminal Law (12 ed.), vol. 1, sec. 64; Weihofen, Insanity as a Defense in Criminal Law (1933), pp. 100-103; Weihofen, Partial Insanity and Criminal Intent, 24 Ill. Law Rev. 505 (1930); Keedy, Insanity and Criminal Responsibility, 30 Harv. Law Rev. 535, 552-554 (1917); Mental Abnormality and Crime, English Studies in Criminal Science (1944), pp. 61-63; Glueck, Mental Disorder and the Criminal Law (1925), pp. 199-208; Hall, Mental Disease and Criminal Responsibility, 45 Col. Law Rev. 677 (1945).

peculiarly of local concern. Compare *McNabb* v. *United States*, 318 U. S. 332, with *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156. This Court has in a less important matter undertaken to adjust by decision an outmoded rule of the common law to modern conditions. But when that step was taken, it was declared that "experience has clearly demonstrated the fallacy or unwisdom of the old rule." *Funk* v. *United States*, 290 U. S. 371, 381. See *Weiler* v. *United States*, 323 U. S. 606, 609.

Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.

Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-5. The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER dissenting.

A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt. It is not enough that a trial goes through the forms of law. Especially where life is at stake it is requisite that the trial judge should so guide the jury that the jurors may be equipped to determine whether death should be the penalty for conduct. Of course society must protect itself. But surely it is not self-protection for society to take life without the most careful observance of its own safeguards against the misuse of capital punishment.

This case has been much beclouded by laymen's ventures into psychiatry. We are not now called upon to decide whether the antiquated tests set down more than a hundred years ago regard-

ing mental responsibility for crime[1] are still controlling or whether courts should choose from among the conflicting proposals of scientific specialists.[2] This is not the occasion to decide whether the only alternative is between law which reflects the most advanced scientific tests and law remaining a leaden-footed laggard. The case turns on a much simpler and wholly conventional issue. For the real question, as I see it, is whether in view of the act of Congress defining murder in the first degree for prosecutions in the District and in light of the particular circumstances of this case, the trial court properly sent the case to the jury. That is a very different question from whether the court's charge was unimpeachable as an abstract statement of law. For Fisher is not the name of a theoretical problem. We are not here dealing with an abstract man who killed an abstract woman under abstract circumstances and received an abstract trial on abstract issues. Murder cases are apt to be peculiarly individualized, and this case has its own distinctive features. It is in the light of these that we must decide whether Fisher's death-sentence should legally stand.

According to the more enlightened rule appellate courts may review the facts in a capital case.[3] Were such the scope of our review of death sentences, I should think it would be hard to escape what follows as the most persuasive reading of the record.

Fisher had learned from his boss of Miss Reardon's complaint about the slackness of his work. On the fatal morning, Miss

---

[1] *Regina* v. *M'Naghten*, 10 Cl. & F. 200 (1843). More than sixty years ago Sir James Fitzjames Stephen brought weighty criticism to bear on the *M'Naghten* case. 2 Stephen, *A History of the Criminal Law of England* (1883) 153 *et seq.*; for more recent consideration of the case, see Glueck, *Mental Disorder and the Criminal Law* (1925) c. 6; Cardozo, *What Medicine Can Do For Law* (1930) 28-35.

[2] See, *e. g.*, White, *Insanity and the Criminal Law* (1923); Abrahamsen, *Crime and the Human Mind* (1944); Lindner, *Rebel Without A Cause* (1944); Radzinowicz & Turner, eds., *Mental Abnormality and Crime* (1944); Reik, *The Unknown Murderer* (1945); see also, Hall, *Mental Disorders and Criminal Responsibility* (1945) 45 Col. L. Rev. 677, 680-84, and authorities cited therein.

[3] See, *e. g.*, Annotated Laws of Massachusetts, c. 278, § 33 E; *Commonwealth* v. *Gricus*, 317 Mass. 403, 406; *Massachusetts Judicial Council, Third Report* (1927) 40-43, 131-35; *Massachusetts Judicial Council, Thirteenth Report* (1937) 28-30; New York Constitution, Article 6, § 7; *People* v. *Crum*, 272 N. Y. 348; Cardozo, *Jurisdiction of the Court of Appeals* (2d ed., 1909) § 51; American Law Institute, *Code of Criminal Procedure* (Official Draft, 1930) § 457(2); Orfield, *Criminal Appeals in America* (1939) 83 *et seq.*

The reasons for such review are succinctly stated in the *Thirteenth Report of the Massachusetts Judicial Council, supra*, at 29: "In substance this [denial of the right to consider the facts by the appellate court] means that there is

Furthermore, the problem, as it arises in this case, involves a question of local policy as to which the decision of the local appellate tribunal, which is in accord with the weight of authority, should be regarded as final, at least in the absence of compelling reasons for the adoption of a new principle. Cf. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

B. EVEN IF THE SUGGESTED RULE SHOULD BE REGARDED FAVORABLY, THE EVIDENCE DID NOT REACH THAT DEGREE OF SPECIFICITY WHICH WOULD HAVE PERMITTED THE JURY TO DETERMINE WHETHER PETITIONER LACKED THE CAPACITY TO DELIBERATE OR TO PREMEDITATE THE HOMICIDE

Counsel for petitioner, although advocating initially in the trial court the application of the "partial insanity" doctrine, seems, at the last, to have led the trial judge to believe that he would not insist upon that doctrine, by asserting that his expert evidence would demonstrate that petitioner was insane within the established legal concepts. That issue was fully submitted to the jury, its verdict was against petitioner (see pp. 13–14, *supra*), and he does not now urge that its verdict was erroneous in that respect. But, even if petitioner was entitled to insist upon an appraisal of his expert testimony from the standpoint of partial insanity, it would seem plain that the testimony did not rise to that degree of specificity that would have permitted the jury to determine

whether petitioner lacked the capacity to deliberate or to premeditate the homicide.

We think the evidence on these questions has been fairly appraised in the opinion of the court below: "With respect to the issue of deliberation the psychiatric testimony went no further than to say that [petitioner] was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men" (R. 117). The psychologist who testified for petitioner merely stated that he had a mental age of eleven years and four months (p. 8, *supra*). But there was no evidence that this precluded petitioner from deliberating or premeditating, or even affected his ability to premeditate and deliberate, and, indeed, the Government's psychiatrist testified that such a person had nearly the intellectual ability of a normal person (p. 12, *supra*). Petitioner's psychiatrist testified that petitioner was afflicted with various forms of mental disorder, but he said nothing as to whether these prevented petitioner from having the capacity to deliberate or premeditate. He did express a doubt whether petitioner could entertain an intent to commit the killing because of a deranged mental condition, but just how that derangement affected petitioner's powers of deliber-

ation and premeditation was left completely unexplained (pp. 10–11, *supra*). Accordingly, we submit that there was no evidence of probative value which would warrant submission to the jury of the questions whether petitioner was without the power to deliberate or to premeditate the homicide because of his mental and emotional characteristics.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

W. MARVIN SMITH,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

NOVEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 122.—October Term, 1945.

Julius Fisher, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 10, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari brings here for review the sentence of death imposed upon petitioner by the District Court of the United States for the District of Columbia after a verdict of guilty on the first count of an indictment which charged petitioner with killing by choking and strangling Catherine Cooper Reardon, with deliberate and premeditated malice. The United States Court of Appeals for the District of Columbia affirmed the judgment and sentence of the District Court. 149 F. 2d 28.

The errors presented by the petition for certiorari and urged at our bar were, in substance, that the trial court refused to instruct the jurors that they should consider the evidence of the accused's psychopathic aggressive tendencies, low emotional response and borderline mental deficiency to determine whether he was guilty of murder in the first or in the second degree. The aggregate of these factors admittedly was not enough to support a finding of not guilty by reason of insanity.[1] Deliberation and premeditation are necessary elements of first degree murder.

Considerations as to the exercise of authority by this Court over the courts of the District of Columbia in the interpretation of local criminal statutes induced us to grant the writ in view of the issue presented. Judicial Code, Section 240(a).

The homicide took place in the library building on the grounds of the Cathedral of Saint Peter and Saint Paul, Washington, D. C.,

[1] The Code of Law for the District of Columbia (1940 Ed.) provides as follows:

Title 22, section 2401, "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery,

between eight and nine o'clock, a.m., on March 1, 1944. The victim was the librarian. She had complained to the verger a few days before about petitioner's care of the premises. The petitioner was the janitor. The verger had told him of the complaint. Miss Reardon and Fisher were alone in the library at the time of the homicide. The petitioner testified that Miss Reardon was killed by him immediately following insulting words from her over his care of the premises. After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence. He then dragged her to a lavatory and left the body to clean up some spots of blood on the floor outside. While Fisher was doing this cleaning up, the victim "started hollering again." Fisher then took out his knife and stuck her in the throat. She was silent. After that he dragged her body down into an adjoining pump pit, where it was found the next morning. The above facts made up petitioner's story to the jury of the killing.

It may or may not have been accepted as a whole by the jury. Other evidence furnishes facts which may have led the jury to disbelieve some of the details of accused's version of the tragedy. In his original confession, the accused made no reference to Miss Reardon's use of insulting words. In his written confession, they were mentioned. In his testimony their effect upon him was amplified. There are minor variations between Fisher's written confession and his testimony. In the written confession Fisher admitted that his main reason for assaulting Miss Reardon was because she reported him for not cleaning the library floor. The Deputy Coroner said the knife wound was not deep, "just went through the skin."

The effort of the defense is to show that the murder was not deliberate and premeditated; that it was not first but second degree murder. A reading of petitioner's own testimony, summarized

---

or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

Title 22, section 2403, "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

Title 22, section 2404, "The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

above, shows clearly to us that there was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. Cf. *Bostic* v. *United States*, 94 F. 2d 636, 638. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process. It is the contention of the defense that the mental and emotional qualities of petitioner were of such a level at the time of the crime that he was incapable of deliberation and premeditation although he was then sane in the usual legal sense. He knew right from wrong. See The M'Naghten Rules, 10 C. and F. 200, 210. His will was capable of controlling his impulses. *Smith* v. *United States*, 36 F. 2d 548. Testimony of psychiatrists to support petitioner's contention was introduced. An instruction charging the jury to consider the personality of the petitioner in determining intent, premeditation and deliberation was sought and refused.

From the evidence of the psychiatrists for the defense, the jury might have concluded the petitioner was mentally somewhat below the average with minor stigmata of mental subnormaley. An expert testified that he was a psychopathic personality[2] of a predominantly aggressive type. There was evidence that petitioner was unable by reason of a deranged mental condition to resist the impulse to kill Miss Reardon. All evidence offered by the defense was accepted by the trial court. The prosecution had competent evidence that petitioner was capable of understanding the nature and quality of his acts. Instructions in the usual form were given by the court submitting to the jury the issues of insanity, irresistible impulse, malice, deliberation and premeditation. Under these instructions, set out below the jury could have determined from the evidence that the homicide was not the result of premeditation and deliberation.[3]

[2] "The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character." Curran and Mallinson, Psychopathic Personality (1944), 90 J. Ment. Sci. 278.

[3] These instructions were given:

Insanity. "In behalf of the defendant, it is contended that he was insane, and therefore not legally responsible, hence should be acquitted by reason of insanity.

"It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if

Reardon told Fisher that he was not doing the work for which he was being paid, and in the course of her scolding called him a "black nigger." This made him angry—no white person, he claimed, had ever called him that—and he struck her. She ran screaming towards the window in the back of the room. Fisher ran out of the room and up the stairs. Her screaming continued. At the top of the stairs he saw a pile of wood lying by the fireplace. He seized a piece of wood, ran down the stairs and struck her on the head. The stick broke and he seized her by the throat. She continued to scream until she went limp. He then dragged her to the lavatory and left her there while he went back to clean up the spots of blood. She recovered sufficiently to scream again, and he returned to the lavatory and cut her slightly with a knife he carried in his pocket. The importance of the screaming is a key to the tragedy. It is difficult to disbelieve Fisher's account that he never wanted to kill Miss Reardon but wanted only to stop her screaming, which unnerved him.

"She ran out from behind her desk, down toward the back, screaming."

"The screaming seemed to have gotten on my nerves."

"I was running up on the steps, with her all the time screaming."

"She was still screaming and I began choking her then."

"I was just trying to keep her from making noise."

". . . she started hollering and I tried to stop her from hollering."

"Then I began choking her because she was still hollering."

". . . I did not strike her any more after the noise had ceased."

". . . she started hollering again."

"She kept hollering, seemed like to me."

"My idea was just trying to stop her from hollering, is all I can think about."

"After that she stopped hollering."

The next day he started to go to the Cathedral to work as usual. He made two attempts to enter the Cathedral grounds. About

---

no review of the discretion of the single judge. Thus a matter of life or death, once treated [in Massachusetts] with the utmost care, even beyond the requirements of the law, has now been committed to a single judge of the Superior Court, with no review whatever on its most vital aspects. Such a situation places an unfair responsibility upon the trial judge and upon the governor, is a potential threat to justice, and is not reassuring to the public who have a right to demand that judicial considerations should be exhausted before a man is condemned to death."

the first, he said he got "nervous and shaky, and [he] couldn't go in there." Later he "kept thinking about what [he] had done to her. [He] didn't know whether she was dead or alive. [He] was afraid to go up there and tell them that [they] had had an argument or fight." When apprehended by two detectives he said, "I had some trouble with a lady out at the Cathedral."

The evidence in its entirety hardly provides a basis for a finding of premeditation. He struck Miss Reardon when she called him "black nigger." He kept on when her screaming frightened him. He did not know he had killed her. There is not the slightest basis for finding a motive for the killing prior to her use of the offensive phrase. Fisher, to be sure, had Miss Reardon's ring in his possession. But it came off in his hand while he was dragging her, and he put it away when he reached home to conceal its possession from his wife. He did not run away and he cleaned up the blood "because [he] did not want to leave the library dirty. leave awful spots on the floor, [he] wanted to clean them up." He treated the spots on the floor not as evidence of crime but as part of his job to keep the library clean. Fisher was curiously unconnected with the deed, unaware of what he had done. His was a very low grade mentality, unable to realize the direction of his action and its meaning. His whole behavior seems that of a man of primitive emotions reacting to the sudden stimulus of insult and proceeding from that point without purpose or design. Premeditation implies purpose and purpose is excluded by instantaneous action. Fisher's response was an instinctive response to provocation, and premeditation means nothing unless it precludes the notion of an instinctive and uncalculated reaction to stimulus. Accordingly, if existing practice authorized us to review the facts in a capital case I should be compelled to find that the ingredients of murder in the first degree were here lacking. I would have to find that the necessary premeditation and deliberation for the infliction of a death sentence were wanting, as did the New York Court of Appeals in a case of singularly striking similarity. *People* v. *Caruso*, 246 N. Y. 437. It is significant that the Court of Appeals for the District of Columbia has heretofore deemed it within its duty to examine the evidence in order to ascertain whether a finding of premeditation and deliberation was justified. *Bullock* v. *United States*, 122 F. 2d 213.

But while it is not now this Court's function to interpret the facts independently,[4] the jury, under guidance appropriate for a murder case, might well have so interpreted them because the facts are persuasively so interpretable. If, under adequate instructions, it could have so found, the homicide falls outside the requirements for a finding of murder in the first degree. Congress in 1901 enacted a code for the District in which it joined the growing movement of dividing murder into degrees.[5] Congress confined the death sentence to killing by premeditation; it required designed homicide, previous deliberation that life was to be taken before the United States would take life in retribution.[6]

---

[4] As to certain classes of litigation that come here, this Court has, of course, always had power to review the evidence. *E. g.*, "[Since] by an appeal, except when specifically provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge." In re *Neagle*, 135 U. S. 1, 42.

[5] District of Columbia Code (1940) § 22-2401: "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in the perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

§ 22-2402: "Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree."

§ 22-2403: "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

[6] The legislative history of these sections is meagre. The separation of the crime of murder into two degrees seems to have been first proposed for the District in the Code of 1857. C. 130, §§ 1-2. That Code was never enacted by Congress. The present provisions are the result of a Code prepared by Judge Cox and enacted in 1901. 31 Stat. 1189, 1321. In an historical note that precedes the Code, Judge Cox stated that it was to have been based on the laws of Maryland. District of Columbia Code (1940 ed.) *xiv*. In a letter to the Washington Board of Trade, however, Judge Cox stated that the Code was based on the laws of Maryland, Virginia, New York, and Ohio. *Report of the Washington Board of Trade*, November 14, 1898, pp. 23-24. And the Washington *Law Reporter*, vol. 26, p. 201, states that the "portion of the work relating to crime and punishment follow the statutes of New York in creating degrees in the crime of murder." A comparison of the Code with the New York Penal Code of 1898, §§ 183, 183a, 184, bears out this statement, though the exact language of the New York statute was not adopted.

The reports of each of the four States, however, up to the time of the enactment of the District Code, indicates unanimity in one essential element. For a homicide to constitute murder in the first degree, the jury must find

The division of murder into degrees arose from the steadily weakened hold of capital punishment on the conscience of mankind. See Calvert, *Capital Punishment in the Twentieth Century* (5th ed.; 1936); *Report from the Select Committee of the House of Commons on Capital Punishment, and Minutes of Evidence* (1930). The crime of murder was divided into two classes, in some States very early,[7] in recognition of the fact that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. It is this consideration that has led most of the States to divide common law murder into two crimes, and Congress followed this legislation. See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701, 703-704; Michael and Wechsler, *Criminal Law and Administration* (1940) 1269 *et seq.*

The bite of law is in its enforcement. This is especially true when careful or indifferent judicial administration has consequences so profound as does the application of legislation dividing murder into first and second degrees—consequences that literally make the difference between life and death. This places the guiding responsibility upon the trial court in no wise restricted by the course pursued by the defense. The preoccupation at the trial in the treatment of the conviction by the court below and by the arguments at the bar of this Court was with alluring problems of psychiatry. Throughout this melancholy affair the insistence was on claims of Fisher's mental deficiencies and the law's duty to

---

in addition to the element of intent to kill, premeditation and deliberation. *E. g., Spencer* v. *State*, 69 Md. 28 (1888); *Leighton* v. *People*, 88 N. Y. 117 (1882); *People* v. *Majone*, 91 N. Y. 211 (1883); *People* v. *Conroy*, 97 N. Y. 62 (1884); *People* v. *Hawkins*, 109 N. Y. 408 (1889); *People* v. *Barberi*, 149 N. Y. 256 (1896); *Ohio* v. *Neil*, Tappan (Ohio) 120 (1817); *State* v. *Turner*, Wright (Ohio) 20 (1831); *State* v. *Gardner*, Wright (Ohio) 392 (1833); *State* v. *Thompson*, Wright (Ohio) 617 (1834); *Shoemaker* v. *State*, 12 Ohio 43 (1843); *Ohio* v. *Brooks*, 1 Ohio Dec. 407 (1851); *Fouts* v. *State*, 8 Ohio St. 98 (1857); *State* v. *Cook*, 2 Ohio Dec. 36 (1859); *Burns* v. *State*, 3 Ohio Dec. 122 (1859); *State* v. *Maxwell*, Dayton (Ohio) 362 (1867); *Zeltner* v. *State*, 32 Ohio C. C. 102 (1899); *Commonwealth* v. *Jones*, 1 Leigh. (Va.) 598 (1829); *Dejarnette* v. *Commonwealth*, 75 Va. 867 (1881); *Hite* v. *Commonwealth*, 96 Va. 489 (1898); *Jackson* v. *Commonwealth*, 97 Va. 762 (1899).

[7] Pennsylvania enacted this type of legislation in 1794. Pennsylvania Laws, 1794, c. 257, §§ 1-2. This early statute has served as the pattern upon which most legislative action with a similar purpose has been based. See Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. 701, 703-704; Michael and Wechsler, *Criminal Law and Administration* (1940) 1270-73. The District Code does not depart very far from the language of the original Pennsylvania statute; nor did the statute of the Territory of Utah construed by this Court in *Hopt* v. *People*, 104 U. S. 631, 632.

take into consideration the skeptical views of modern psychiatry regarding the historic legal tests for insanity. I cannot but believe that this has diverted attention from the more obvious and conventional but controlling inquiry regarding the absence or presence of the requisite premeditation, under the circumstances of this case.

That the charge requested by the defendant and denied did not go to this issue of premeditation unambiguously but in an awkward and oblique way did not lessen the responsibility of the trial judge to bring this issue—it was the crucial issue—sharply and vividly to the jury's mind. If their minds had been so focused, the jury might well have found that the successive steps that culminated in Miss Reardon's death could not properly be judged in isolation. They might well have found a sequence of events that constituted a single, unbroken response to a provocation in which no forethought, no reflection whatever, entered. A deed may be gruesome and not be premeditated. Concededly there was no motive for the killing prior to the inciting "you black nigger." The tone in which these words were uttered evidently pulled the trigger of Fisher's emotions, and under adequate instructions the jury might have found that what these words conveyed to Fisher's ears unhinged his self-control. While there may well have been murder, deliberate premeditation, for which alone Congress has provided the death sentence, may have been wanting.[8] "While it is unlikely that the jury would return

[8] Federal judges are not referees in sporting contests. Their duty to keep a trial in the course of justice is especially compelling where the penalty for conviction is death. The kind of guidance that a trial judge should give a jury in a case like this is well illustrated by Judge Andrews in *People* v. *Caruso*, 246 N. Y. 437. *E. g.*, "But was there premeditation and deliberation? . . . Time to deliberate and premeditate there clearly was. Caruso might have done so. In fact, however, did he?

"Until the Saturday evening Caruso had never met Dr. Pendola. Nothing occurred at that interview that furnished any motive for murder. Then came nervous strain and anxiety culminating in grief, deep and genuine, for the death of his child. Brooding over his loss, blaming the doctor for his delay in making the promised visit, believing he had killed the boy by his treatment, the doctor finally enters. And when, told of the child's death, he appears to laugh. This added to his supposed injuries would fully account for the gust of anger that Caruso says he felt. Then came the struggle and the homicide.

"As has been said, Caruso had the time to deliberate, to make a choice whether to kill or not to kill—to overcome hesitation and doubt—to form a definite purpose. And where sufficient time exists very often the circumstances surrounding the homicide justify—indeed require—the necessary inference. Not here, however. No plan to kill is shown, no intention of vio-

a verdict of murder in the first degree unless satisfied that the defendant, at the time he committed the offense was capable of entertaining the malicious intent, we cannot, in a case of this kind, speculate as to what considerations entered into their verdict." *Sabens* v. *United States*, 40 App. D. C. 440, 444. The same guiding consideration for reviewing a death sentence was pithily expressed the other day by the present Lord Chief Justice of England: "It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction." *Kwaku Mensah* v. *Rex*, [1946] A. C. 83, 94. In that case, the Privy Council found inadequacy in the direction given by the trial court on considerations that were not mentioned in the courts below nor raised by the appellant. Neither should we permit a death sentence to stand that raises such doubts as does Fisher's conviction on this record.

As I have already indicated, I do not believe that the facts warrant a finding of premeditation. But, in any event, the justification for finding first-degree murder premeditation was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon.[9] The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case, mingled with talk about mental disease. What the jury got was devoid of clear guidance and illumination. Inadequate direction to a jury may be as fatal as misdirection. The observations made by this Court in a civil case are especially pertinent to the duty of a federal judge in a trial

---

lence when the doctor arrived—only grief and resentment. Not until the supposed laugh did the assault begin. . . . The attack seems to have been the instant effect of impulse. Nor does the fact that the stabbing followed the beginning of the attack by some time affect this conclusion. It was all one transaction under the peculiar facts of this case. If the assault was not deliberated or premeditated then neither was the infliction of the fatal wound." 246 N. Y. at 445-46.

[9] ". . . It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.

"In the Federal courts the common law doctrine on this subject has always held." Thayer, *Preliminary Treatise on Evidence* (1898) 188, n. 2.

for murder: " . . . it is the right and duty of the court to aid [the jury] . . . by directing their attention to the most important facts, . . . by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. . . . Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result." *Nudd* v. *Burrows*, 91 U. S. 426, 439.

Only the other day we exercised our supervisory responsibility over the lower federal courts to assure against the possibility of unfairness in the operation of the jury system in ordinary civil suits. *Thiel* v. *Southern Pacific Co.*, 328 U. S. —. By how much more should we guard against a fatal mishap where life is at stake. This Court in reviewing a conviction for murder in the federal courts ought not to be behind the House of Lords and the Privy Council in rejecting strangling technicalities. See *Mancini* v. *Director of Public Prosecutions*, [1942] A. C. 1, 7-8;[10] *Kwaku Mensah* v. *Rex*, *supra*. It should be guided, as was the Privy Council in the case of a lowly West African villager, by broad considerations of justice so as to avoid the mistake of affirming a death sentence which the

[10] "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it. Thus, in *Rex* v. *Hopper* [(1915) 2 K. B. 431], at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental; but Lord Reading C.J., in delivering the judgment of the Court of Criminal Appeal, said [*id.* at 435]: 'We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even though counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a ques-

jury may well not have returned had they had a direction that would have informed their understanding and guided their judgment. In the circumstances of this case failure to charge the jury adequately was to deny Fisher the substance of a fair trial.

Men ought not to go to their doom because this Court thinks that conflicting legal conclusions of an abstract nature seem to have been "nicely balanced" by the Court of Appeals for the District of Columbia. The deference which this Court pays to that Court's adjudications in ordinary cases involving issues essentially of minor or merely local importance seems out of place when the action of this Court, no matter how phrased, sustains a death sentence at the seat of our Government as a result of a trial over which this Court, by direction of Congress, has the final reviewing power. This Court cannot escape its responsibility for the death sentence if it affirms the judgment. One can only hope that even more serious consequences will not follow, which would be the case if the Court's decision were to give encouragement to doctrines of criminal law that have only obscurantist precedents of the past to recommend them. Moreover, a failure adequately to guide a jury on a basic issue, such as that of premeditation on a charge of murder in the first degree, does not reflect a "long established" practice, and one hopes will not become "deeply rooted," in the District.[11] Quite the contrary standard is indicated by an earlier opinion of the Court of Appeals. See *McAfee* v. *United States*, 105 F. 2d 21, 26.

The judgment should be reversed and a new trial granted.

---

tion ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

[11] The only authority adduced for what the Court terms long established practice is *United States* v. *Lee*, 4 Mackey (D. C.) 489 (1886). But that case was decided while common law murder was the law of the District. The enactment of the Code rendered that case's doctrine invalid. Counsel for the Government, a distinguished lawyer, Mr. A. S. Worthington, pointed to the distinction in his argument: "In jurisdictions where murder is divided into two degrees—murder in the first degree requiring deliberation and premeditation; in other words, actual malice—it has been frequently held that evidence of mental excitement resulting from drunkenness and, perhaps, also of other abnormal conditions of the mind not amounting to insanity, may reduce an unprovoked homicide to murder in the second degree; but it has always been held that such evidence cannot of itself reduce the crime to manslaughter." *Id.* at 493. The change wrought by Congress is reflected in *Sabens* v. *United States*, 40 App. D. C. 440; *Bishop* v. *United States*, 107 F. 2d 297; *Bullock* v. *United States*, 122 F. 2d 213, 214.

Mr. Justice MURPHY, dissenting.

As this case reaches us, we are not met with any question as to whether petitioner killed an individual. That fact is admitted. Our sole concern here is with the charge given to the jury concerning the elements entering into the various degrees of murder for which petitioner could be convicted.

The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and of sound administration of justice.

In the past this Court has seen fit to determine various common law issues affecting only the District of Columbia. *Aldridge* v. *United States*, 283 U. S. 308; *Reed* v. *Allen*, 286 U. S. 191; *Best* v. *District of Columbia*, 291 U. S. 411. It has also, on occasion, settled issues involving the interpretation of provisions of the District of Columbia Code. *Washington Fid. Ins. Co.* v. *Burton*, 287 U. S. 97; *Loughran* v. *Loughran*, 292 U. S. 216; *District of Columbia* v. *Murphy*, 314 U. S. 441. In many respects, however, the problem in this instance far transcends the ones presented in those cases.

Here we have more than an exercise in statutory construction or in local law. It is a capital case involving not a question of innocence or guilt but rather a consideration of the proper standards to be used in judging the degree of guilt. What the Court says and decides here today will affect the life of the petitioner as well as the lives of countless future criminals in the District and in the various states. However guarded may be the Court's statements, its treatment of petitioner's claims will have inevitable repercussions in state and federal criminal proceedings. Moreover, these claims, whatever their merit, afford a rare opportunity to explore some of the frontiers of criminal law, frontiers that are slowly but undeniably expanding under the impact of our increasing knowledge of psychology and psychiatry. These factors are more than sufficient to warrant a full and careful consideration of the problems raised by this case.

The issue here is narrow yet replete with significance. Stated briefly, it is this: May mental deficiency not amounting to complete insanity properly be considered by the jury in determining

whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder? The correct answer, in my opinion, was given by this Court more than sixty years ago in *Hopt* v. *People*, 104 U. S. 631, 634, when it said, "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." (Italics added.)

The existence of general mental impairment, or partial insanity, is a scientifically established fact. There is no absolute or clear-cut dichotomous division of the inhabitants of this world into the sane and the insane. "Between the two extremes of 'sanity' and 'insanity' lies every shade of disordered or deficient mental condition, grading imperceptibly one into another." Weihofen, "Partial Insanity and Criminal Intent," 24 Ill. L. Rev. 505, 508.

More precisely, there are persons who, while not totally insane, possess such low mental powers as to be incapable of the deliberation and premeditation requisite to statutory first degree murder. Yet under the rule adopted by the court below, the jury must either condemn such persons to death on the false premise that they possess the mental requirements of a first degree murderer, or free them completely from criminal responsibility and turn them loose among society. The jury is forbidden to find them guilty of a lesser degree of murder by reason of their generally weakened or disordered intellect.

Common sense and logic recoil at such a rule. And it is difficult to marshal support for it from civilized concepts of justice or from the necessity of protecting society. When a man's life or liberty is at stake he should be adjudged according to his personal culpability as well as by the objective seriousness of his crime. That elementary principle of justice is applied to those who kill while intoxicated or in the heat of passion; if such a condition destroys their deliberation and premeditation the jury may properly consider that fact and convict them of a lesser degree of murder. No different principle should be utilized in the case of those whose mental deficiency is of a more permanent character. Society, moreover, is ill-protected by a rule which encourages a jury to acquit a partially insane person with an appealing case simply

because his mental defects cannot be considered in reducing the degree of guilt.

It is undeniably difficult, as the Government points out, to determine with any high degree of certainty whether a defendant has a general mental impairment and whether such a disorder renders him incapable of the requisite deliberation and premeditation. The difficulty springs primarily from the present limited scope of medical and psychiatric knowledge of mental disease. But this knowledge is ever increasing. And juries constantly must judge the baffling psychological factors of deliberation and premeditation, Congress having entrusted the ascertainment of those factors to the good sense of juries. It seems senseless to shut the door on the assistance which medicine and psychiatry can give in regard to these matters, however inexact and incomplete that assistance may presently be. Precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy.

It is also said that the proposed rule would require a revolutionary change in criminal procedure in the District of Columbia and that this Court should therefore leave the matter to local courts or to Congress. I cannot agree. Congress has already spoken by making the distinction between first and second degree murder turn upon the existence of deliberation and premeditation. It is the duty of the courts below to fashion rules to permit the jury to utilize all relevant evidence directed toward those factors. But when the courts below adopt rules which substantially impair the jury's function in this respect, this Court should exercise its recognized prerogative.

If, as a result, new rules of evidence or new modes of treatment for the partly defective must be devised, our system of criminal jurisprudence will be that much further enlightened. Such progress clearly outweighs any temporary dislocation of settled modes of procedure. Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization.

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.

Mr. Justice RUTLEDGE, dissenting.

A revolting crime, such as was committed here, requires unusual circumspection for its trial, so that dispassionate judgment may have sway over the inevitable tendency of the facts to introduce prejudice or passion into the judgment. This means that the accused must not be denied any substantial safeguard for control of those influences. A trial for a capital offense which falls short of that standard, although unwittingly, does not give him his due.

Congress introduced the requirements of premeditation and deliberation into the District of Columbia Code, Title 22, §§ 2401, 2404, in 1901. 31 Stat. 1321, with which compare Rev. Stat. § 5339. I do not think it intended by doing so to change the preexisting law only in cases of intoxication. Hence, I cannot assent to the view that the instructions given to the jury were adequate on this phase of the case. I think the defendant was entitled to the requested instruction which was refused or one of similar import.

I have no doubt that the trial court declined to give it believing that it was not required, perhaps also that it would be erroneous. For the fair-minded and able assistant district attorney who argued the case here conceded, with characteristic candor, that the courts of the District have consistently limited the effect of the controlling Code provision, by way of changing the preexisting law, to cases of intoxication. But, for the reasons in the opinion of Mr. Justice MURPHY, I do not think Congress intended the change to be restricted so narrowly. Accordingly I join in that opinion.

Apart from this defect, the instructions given were correct as far as they went. They were however in wholly abstract form, which in some cases might be sufficient. But the issues of premeditation and deliberation were crucial here on the question of life or death. A more adequate charge, I agree with Mr. Justice FRANKFURTER, would have pointed up the evidence, at least in broad outline, in relation to those issues.

Because I think the charge was deficient in not including the requested instruction or one substantially similar, thus in my opinion failing to meet the standard set by Congress in the Code, and because the effect of this deficiency was magnified by the failure to point up the instructions given in some more definite relation to the evidence, I think the judgment should be reversed.